ENDORSING DISCRIMINATION BETWEEN FAITHS: A CASE OF EXTREME SPEECH?

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Endorsing Discrimination between Faiths: A Case of Extreme Speech?

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Propositions about a religious faith which differs decisively from others were foundational to the House of Lords' decision in *Shabina Begum*.[1] But they were articulated tersely, and commentaries have neglected them. Whether this neglect stems from oversight, or from the prudent timidity now customary in these matters,[2] is unclear. The propositions are drawn out below, by reference to their fuller articulation by the European Court of Human Rights, and a question is then raised: When articulated by editorials, letters to the editor, placards and public speeches, academic articles or political programmes, do these propositions become instances of "extreme" (or "hate") speech?

I

Begum displays the unsatisfactory conceptual and argumentative state[3] of contemporary human rights law. This is worth noticing, on the way to unearthing the decision's real but understated premises.

The case's main holding, for present purposes, is that Denbigh High School's prohibition of Shabina Begum's attending school dressed in a jilbab (long shapeless gown) was a limitation of her freedom to manifest her beliefs which was "necessary in a democratic society in the interests of … the protection of the rights and freedoms of others."[4] There was a secondary holding:[5] her religious freedom was not limited

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1 *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 Appeal Cases 100.

2 On the significance of intimidation in this context, see John Finnis, "Religion and State: Some Main Issues and Sources," American Journal of Jurisprudence 51 (2006) 107-30 at 126.

3 For some instances, see John Finnis, "Nationality, Alienage and Constitutional Principle", Law Quarterly Review 123 (2007) 417-45.

4 European Convention on Human Rights (1950) art. 9:

> 9. *Freedom of thought, conscience and religion* (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(infringed, interfered with or violated) at all, since she was free to go to other schools in or near Luton which would permit her to wear the garment. Though significant, this holding is of more limited practical relevance. For, until Islamization, multiculturalism or sheer informality proceed a good deal further, there will be many areas of the country in which persons like Miss Begum would not have the luxury of this option.

The Lords, even the reluctantly concurring Baroness Hale, make light work of explaining why what was evidently not "necessary for the protection of the rights and freedoms of others" in at least two nearby schools *was* necessary in Denbigh High School. Indeed, that way of framing the issue is conspicuously absent, save in a fleeting and oblique mention by Lord Bingham. Summarizing an argument by counsel for Miss Begum to the effect that the school was "refusing permission when some other schools permitted it," Lord Bingham responds simply that "different schools have different uniform policies, no doubt influenced by the composition of their pupil bodies and a range of other matters. Each school has to decide what uniform, if any, will best serve its wider educational purposes." Here, as in much of the Lords' discussion of justification under art. 9(2), the issue of *necessity* – whether for protection of rights or for anything else – seems sidelined in favour of the question whether the school made *a reasonable judgment* about what would "*best* serve" the interests of its pupils.

The same goes for Lord Hoffmann's parallel statement: the school "had decided that a uniform policy was in the general interests of the school and then tried to devise a uniform which satisfied as many people as possible and took into account their different religions."[6] Here again there is no attention to the question whether it

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> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The main holding in *Begum* includes a holding that the limitation on her freedom was "prescribed by law" in so far as it was prescribed by the school rules made by and for this particular state-maintained school.

5 Lords Bingham, Hoffmann & Scott; Lord Nicholls and Baroness Hale doubting. There are two further holdings: (i) that her right to education was not engaged, for analogous reasons, and (ii) that she had not been "excluded" for the purposes of the ill-drafted School Standards and Framework Act 1998. These both come over from the companion case of *Ali v Lord Grey School Governors* UKHL 14, [2006] 2 Appeal Cases 363.

6 *Begum* para. 67. Lord Hoffmann is here dealing with the Court of Appeal's ruling that the school violated art. 9 by failing to adopt the right procedures – including a review of the obligations of public authorities under the Human Rights Act 1998 and the ECHR – when

was not merely "in the general interests" of the school but, rather, *necessary* to restrict anyone's freedom to manifest religious belief. And that question seems out of focus even when Lord Hoffmann says, or implies, that the trial judge had held that "the school was entitled to consider that the rules about uniform were necessary for the protection of the rights and freedoms of others"; for the passage he quotes from Bennett J's judgment says nothing about necessity; it instead finds that the policy on uniforms "promotes a positive ethos and a sense of communal identity" and "*aims* to protect [the] rights and freedoms" of those Muslim female pupils who otherwise would "feel pressure on them either from inside or outside the school" to wear a garment they do not wish to wear."[7] That the school was *aiming* to protect rights is clearly relevant. It was perhaps indispensable to a demonstration that the policy was necessary, or was judged necessary, for that purpose. But, in the absence of any comparison with alternative assessments of the need and alternative policies for meeting it, it demonstrates neither necessity nor even a judgment of necessity by the school.

Instead, the articulated argumentation of the Lords' judgments looks to (1) *proportionality* (see especially Bingham para. 26) and (2) *margin of appreciation* or, rather, *deference* to the *area of judgment* (Hoffmann para. 64) to be accorded to the national constitutional order's non-judicial parts, notably Parliament and the head teachers and governors of maintained secondary community schools.

So one must ask, first, why proportionality, in the context of justification under art. 9(2), did not require of the school's policy formation more than the abundant care and good judgment admired by the Lords. Does not art. 9(2), taken with the Strasbourg jurisprudence, require that any policy restricting manifestations of religious or philosophical belief (a) be doing so in response to a "pressing social need", and (b) be, among otherwise appropriate measures, "the measure that is *the least restrictive*" of the right to manifest such belief? This is the question which Judge Tulkens presses in dissent against the other sixteen judges of the Grand Chamber (and the seven judges of the Fourth Section) of the European Court of

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determining its policy on school uniforms. That ruling would have had wide significance had it not been utterly rejected by the Lords in *Begum*, and need not be considered further here.

[7] *Begum* para. 58. Since Lord Scott agreed fully with the judgments of Lords Bingham and Hoffmann, and Lord Bingham agreed fully with Lord Hoffmann's, the latter's, if not also Lord Bingham's, is a judgment commanding majority support.

Human Rights in *Sahin v Turkey* (2005).[8] The question is met with resounding silence both in the Grand Chamber and the Lords. The conceptually relaxed and undemanding criteria employed in those tribunals -- legitimacy of aim and proportionality of means -- seem more appropriate to justifying some allegedly discriminatory differentiation between persons than to showing that a well-intentioned measure is "*necessary* in a democratic society".

The same goes, I think, for the Lords' deference to the area of judgment they treat as accorded to the school. To be sure, the Court of Appeal was misguided in demanding that the school explicitly attend to the Convention when adopting school rules. But did the trial judge investigate precisely whether – and if so, why -- the school judged *necessary* what nearby schools judged unnecessary? As we have seen, he seems instead to have been content to find that the school was *aiming* to protect the rights and freedoms of girls who did or would otherwise "feel pressure on them either from inside or outside the school" to wear a garment they do not wish to.

In sum, the Lords' judgments on the justifiability of banning the jilbab from Denbigh School seem thin, conclusory, and result-oriented. Even Baroness Hale, who was more impressed by Judge Tulkens than by the views of the other twenty-two Strasbourg judges in *Sahin*, does not really face up to the question whether the schools policy on uniforms was necessary in the face of alternative policies which would have permitted the jilbab. She does hold, importantly, that "the justification which Judge Tulkens found lacking" is supplied by the evidence of other girls' fear of being pressured. But what she concludes from that, directly and immediately, is no more than that the school's policy was "a thoughtful and proportionate response to reconciling the complexities of the situation" given "the social conditions in that school, in that town, and at that time"[9] The conceptual slackness of human rights law-in-action is impressive.

II

Yet the result in *Begum* seems right. The school's determination to hold onto its policy[10] in the face of threatened and actual litigation is some evidence of its own

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8 *Sahin v Turkey* (44774/98) (2007) 44 European Human Rights Reports 5 (Judgments of 10 November 2005): see secs. 2, 5, 8, and 13 of her dissenting judgment.

9 *Begum* para. 98.

10 The school being about 80% (sometimes over 90%) Muslim, and its (female) headteacher being of Muslim origin, its policy approved (besides English-style uniforms) several kinds of

judgment that its policy was indeed necessary, and alternative policies quite inappropriate. In deferring to this opinion, the Lords found *Sahin* "valuable guidance," and strong support.[11] To a far greater extent than the judgments disclose, counsel for the school had rested his argument about justification squarely and almost exclusively on *Sahin*,[12] where both chambers of the Strasbourg Court had deferred, with little sign of strain, to the rulings of the Turkish courts and other authorities. It is in *Sahin* that the real premise and thrust of *Begum* can be found.

The issue in *Sahin* arose out of a ruling of the Turkish Constitutional Court in 1989, striking down a 1988 enactment about dress in universities. This enactment, while requiring "modern dress" in all educational institutions, allowed that "a veil or headscarf covering the neck and hair may be worn out of religious conviction." The Constitutional Court held it subversive of the constitutional guarantee of secularism, and thus a violation of the underlying values and rights of conscience, of religious freedom, and of equality. That ruling is foundational for the decisions of both chambers at Strasbourg in *Sahin*. They defer to the judgment of the Turkish authorities, judicial and non-judicial, about the threat that even a *permission* to use Islamic dress will pose, where Islam is the religion of the majority, to freedom of conscience and religion.

The precise contours and grounds of this judgment, one that would have been found surprising by many British readers (at least in 1989, if not so much so in November 2005), are explored in sec. III below. For the present, they can be summarised by reference to a statement which, on its surface, seems not to discriminate (differentiate) between religions: "when a particular dress code [is] imposed on individuals by reference to a religion, the religion concerned [is] perceived and presented as a set of values that [are] incompatible with those of contemporary society."[13] That incompatibility, however, is elaborated in terms of two further but related considerations: the equality rights of women; and the rights and freedoms of all those, whether Muslim, ex-Muslim or non-Muslim, who choose not to conform to what some Muslims perceive and present as a religious duty – a right, in

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Islamic-type attire less constrictive than the jilbab (and less redolent of Islamic political movements such as the Muslim Brotherhood and its offshoots).

11 *Begum* paras. 32 (Lord Bingham), 59 (Lord Hoffmann). Baroness Hale, as we have seen, was doubtful.

12 See *Begum* [2007] 1 Appeal Cases 100 at 104, 107 (Richard McManus Q.C.).

13 *Sahin*, Grand Chamber sec. 39, paraphrasing the reasoning of the Constitutional Court of Turkey.

other words, to be free from intimidation or pressure. Moreover, thirdly, "there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts... [E]ach Contracting State may…take a stance against such political movements, based on its historical experience.", Measures such as those in issue in *Sahin*, forbidding the Islamic headscarf, "have to be viewed in that context and constitute a measure intended to achieve the legitimate aims" of protection of rights and freedoms and public order.[14]

Microcosmically, *Begum* tracks this line of thought. It upholds the school's judgment that wearing the jilbab is impermissible because permitting it would result[15] in a threat to the rights of other children, if not of apparent volunteers such as Miss Begum herself. Obviously, the use of a religious symbol to manifest one's personal belief can only threaten the rights of others if it is associated with a definite and particular kind of religious culture. To be the matrix for a threat of this kind, a religious culture must have one or more of a cluster of features: a disrespect for equality (here the equality of females, especially girls and young women); a denial of immunity from coercion in religious matters (including matters of apostacy from that religion or rejection of all religion) – the immunity now central to Christian political teaching;[16] a mandating, encouragement or permission of intimidation of apostates, backsliders and others; a treatment of all arenas, educational or political, as in principle subject to threatening pressure, indeed compulsion, in the name of religious truths and precepts and of promoting adherence to them.

All this lies just below the surface of the Lords' terse allusions to the school's fear of "adverse repercussions" if they allowed the jilbab;[17] to measures "to protect girls against external pressures", with mention also of "an extremist version of the Muslim religion";[18] to "patriarchal dominance of … families;"[19] and to the "quite unnecessarily confrontational" behaviour, verging on the "threatening," of the two

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14 *Sahin*, Grand Chamber sec. 115 quoting Fourth Section secs. 107-9.

15 The causality here is what Aquinas would call *removens prohibens*: removing the ban would allow those (inside and outside the school) who wish to demand that all (Muslim) girls wear this garment to make that demand much more efficaciously than before. The ban blocks the pressure.

16 See Finnis, "Religion and State…" at 117-22.

17 *Begum*, para 34 (Lord Bingham).

18 Ibid., para. 65 (Lord Hoffmann).

19 Ibid., para. 98 (Baroness Hale).

men who accompanied Shabina Begum at her first wearing of the jilbab to school.[20] All these can be treated as incorporating by tacit reference the allusion to "pressing social need" made by both chambers of the Strasbourg Court in *Sahin*.[21]

Turkey's "historical experience" of political and social life in the context of adherence by 94% of its population to the same religion as that of 80-90% of the children at Denbigh School, supplied the Lords in *Begum* with interpretative premises more realistic than are generally available in British public discourse or had been elaborated by counsel or the lower courts. Lessons of that experience are crystallised both in *Sahin* and in the much more important case which made the outcome in *Sahin* easy to predict, *Refah Partisi (The Welfare Party) v Turkey* (2003).[22] The Refah [Welfare] Party was the largest in Turkey's Parliament, and in the governing coalition, when in January 1998 it was dissolved, and its assets confiscated, by the Constitutional Court on the ground that the Party was a "centre of activities contrary to the principle of secularism". The decision was upheld 4: 3 in the Third Section at Strasbourg in July 2001,[23] and reaffirmed unanimously by the Grand Chamber (seventeen judges) in February 2003.

The Strasbourg Court's grounds for upholding such drastic action were that the Refah Party had been sufficiently shown to advocate and intend the introduction of Islamic law, *sharia*, either for everyone or as part of a plural system of laws for citizens of different faiths, and that its leaders' statements about *jihad* did not clearly

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20 Ibid., paras 79, 80 (Lord Scott); at para. 10 Lord Bingham records that the deputy headteacher, who was thus confronted, "felt that their approach was unreasonable and he felt threatened".

21 Para. 115 of *Sahin* quoting the judgment of the Fourth Section: "As has already been noted (see … *Refah Partisi*...), the issues at stake include the protection of the "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated..., this religious symbol has taken on political significance in Turkey in recent years."

22 *Refah Partisi (No. 2) v Turkey* (2003) 37 European Human Rights Reports 1. In sec. 95 of its judgment, the Grand Chamber addressed matters before it, not in the case in hand, but in *Sahin* (on which proceedings the European Court of Human Rights had not yet pronounced)::

> 95. In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others (see *Karaduman v. Turkey*, no. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93).

23 *Refah Partis (No. 1) v Turkey* (2002) 35 European Human Rights Reports 3

rule out resort to force to achieve its aims. Even in the absence of threats of force, both *sharia* and plural religiously based legal systems are in themselves, even if democratically adopted, inherently incompatible (so the Court finds) with the European Convention on Human Rights and the conceptions of democracy and the rule of law which it enshrines. The Grand Chamber also unanimously rejected the view of the dissenting judges (including the English judge) in the Third Section that dissolution was disproportionate to the danger and could safely await concrete steps to put the Refah Party's programme into effect by enacting it.

In the course of this, the Grand Chamber in *Refah* briefly restated the well-known thesis of Strasbourg jurisprudence: "the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs."[24] But only if that thesis is read in an extremely refined and limited sense can it be regarded as compatible with what the Court (in Turkey and in Strasbourg) actually held and did in *Refah.* For *sharia*, not to mention quasi-*millet* legal pluralism and forcible *jihad*, can hardly be thought of as extraneous to the religion under consideration; and the finding that they are each and all simply incompatible with the European Convention on Human Rights is equivalent to an assertion of their illegitimacy. Moreover, these are findings about a particular religion, not all religions; for there is no reason to think that other significant religions today share any of these illegitimate tenets or projects, or any similar tenets or projects.

The Strasbourg Court's willingness – as shown by its actions -- thus to discriminate between one faith and others made it easy for the Lords in *Begum* to reject an equality or non-discrimination argument which Miss Begum's counsel made a main part of her submissions on the (un)justifiability of the jilbab ban:

> A school that favours some religious symbols but not others is also guilty of discrimination which is a wrong in itself. By refusing to allow the claimant to wear the jilbab the school prevented her alone from expressing her particular religious belief while permitting others to express theirs. The exclusion treated

[24] *Refah (No. 2)*, sec. 91.

> the claimant and her religious beliefs less favourably than other pupils and that was contrary to article 14 of the Convention.[25]

The Lords rejected this; they simply treated it as unarguable once a pressing social need had been shown, in relation to art. 9(2), for restricting the relevant manifestations of the particular religious belief in question.[26]

III

In resolving the little local difficulty about jilbabs in Denbigh High School, the Lords accepted counsel's invitation to place much weight on the Strasbourg Court's *Sahin* decision on the wider but still limited question of headscarves in Turkish universities. But that decision in turn refers us, at its key points,[27] to *Refah*'s use of a similar principle of "militant democracy"[28] to resolve great national issues.

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25 *Begum* [207] 1 Appeal Cases at 107 (Cherie Booth Q.C.). As Richard McManus Q.C. said in reply, the argument from art. 14 had not been advanced in earlier phases of the proceedings (though, as Lord Bingham observes at para. 13, Miss Begum's solicitors had appealed to art. 14, inter alia, in their initial statement of reasons why the school should take her back, a month after the initial sending-home), and none of the Lords' judgments consider it worthy of mention: a finding that restriction of religious rights is justified under art. 9(2) is tantamount.to a finding that the relevant discrimination in relation to religion (or that religion) is justified (or, to speak more closely in line with the way art. 14 uses the word "discrimination", is differential treatment without discrimination). Art. 14:

> 14. *Prohibition of discrimination.* The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

26 On the imperative need (for the sake of justice and respect for religious rights) to distinguish (discriminate) between particular religions, and on a recent plain albeit limited acknowledgement of this by the British Parliament, see Finnis, "Religion and State" at 124-7, quoting (at 125) Equality Act 2006, s. 52(4)(g), which authorizes certain public decisions "taken on the grounds…(ii) that a religion or belief is not to be treated in the same way as certain other religions or beliefs."

27 *Refah* is cited by the Grand Chamber in *Sahin (No. 2)* in secs. 35, 107, 108 and most decisively in secs. 114-115.

28 "Militant democracy" is explained in the Third Section's summary of the Turkish Government's case:

> 62. The Government asserted that, when confronted with the risk which political Islam represented for a democratic regime based on human rights, that regime was entitled to take measures to protect itself from the danger. "Militant democracy", in other words a democratic system which defended itself against all political movements which sought to destroy it, had been born as a result of the experience of Germany and Italy between the wars with fascism and national-socialism, two movements which had come to power after more or less free elections. In the Government's submission, militant democracy required political parties, its indispensable protagonists, to show loyalty to democratic principles, and accordingly to the principle of secularism. The concept of militant democracy and the possibility

So it is easy to picture sensible British politicians or citizens finding much food for thought in *Refah*, when deliberating about great issues touching their own country..

For the findings and certain uncontested arguments in *Refah* have wide relevance. Recall the three grounds for dissolving Refah, the Prime Minister's political party:

> … Refah advocated [i] setting up a plurality of legal systems, introducing discrimination between individuals on the ground of their religious beliefs and functioning according to different religious rules for each religious community, in which [ii] sharia would be the applicable law for the Muslim majority of the country and/or the ordinary law. In addition, … [iii] Refah did not exclude the possibility of recourse to force in certain circumstances in order to oppose certain political programmes, or to gain power and retain it.[29]

The Government of Turkey, the Turkish Constitutional Court, the Third Section (including the dissenting judges), and the entire Grand Chamber all stressed that each of these policies is incompatible with democracy, the rule of law, and the European Convention on Human Rights;[30] that they are policies rooted in Islam itself; and that they represent a standing danger to any democratic state in which Muslims are sufficiently numerous to hope to impose their will on the political community. The Turkish Constitutional Court had considered them "specific features of Islam".[31] The Government of Turkey, observing that Turkey was "the only Muslim country where there was a liberal democracy after the Western model,"[32] argued before the Third Section of the Strasbourg Court that

> political Islam did not confine itself to the private sphere of relations between the individual and God but also asserted the right to organise the State and the community. In so doing, it showed the characteristics of a totalitarian regime.

> of repressing political groups which abused freedom of association and freedom of expression were set forth in the Constitutions of European States (for example, in Article 18 and Provisional Article XII of the Italian Constitution and Articles 9 § 2, 18 and 21 § 2 of the German Basic Law)….

29 *Refah Partisi* (*No. 1*), sec. 76 (internal numbering added).

30 For the ways in which each of these policies of Refah is incompatible with democracy and the rule of law, see e.g. *Refah (No. 1)* at sec. 70

31 Ibid., sec. 24.

32 Ibid., sec. 61. Even the dissenting judges in the Third Section held that "remains the only State with a substantially Islamic population which adheres to the principles of a liberal democracy. The example provided by States governed by fundamentalist Islamic regimes underlines the risk to democracy posed by a departure from the secular ideal." There are 57 states in the inter-governmental Islamic Conference; over forty of these have a Muslim majority and in a further seven half the population is Muslim.

> In order to attain its ultimate goal of replacing the existing legal order with sharia, political Islam used the method known as "*takiyye*", which consisted in hiding its beliefs until it had attained that goal.[33]

The phrase "political Islam" may suggest that there is a non-political Islam, or that the politics in political Islam come from outside Islam. But such suggestions – often conveyed by speaking of "Islamism"[34] -- find no support in the judgments of either chamber. The Third Section found that "the establishment of a theocratic regime" was a possibility in Turkey, not only because of its past (which had included an "Islamic theocratic regime")[35] but because of "the fact that the great majority of its population are Muslims."[36] In a passage adopted by the Grand Chamber:

> …the Court considers that sharia, *which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable*. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it…. a regime based on sharia … clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. .[A] political party whose actions seem to be aimed at introducing sharia … can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.[37]

As to the third ground for banning Refah, namely its leaders' threats to resort to violence and the use of force, the Turkish Government had characterized jihad as "the most generalised and absolute violence", characteristic of all "holy war."[38] The Grand Chamber gives a well-informed but straightforward interpretation of "jihad":

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33 Neither the Third Section nor the Grand Chamber made any finding about Islamic *takiyye* (a practice which had not been denied by the applicants), but each observed more broadly that political parties and movements may conceal their aims and profess their adherence to democracy and the rule of law until it is too late to prevent them overthrowing both: *Refeh (No. 1)* at secs. 48 and 80; *Refah (No.2)* at sec. 101.

34 Notice that, according to the dissenting judges in *Refah (No. 1)*, "the Government in the present case indeed argue that it is a feature of Islamic politics to conceal one's true intentions and to achieve one's aims by surreptitious means". In many circles it is *de rigueur* to replace "Islamic" with "Islamist" in making such a claim, but in *Refah* both Government and judiciary decline to muffle their point.

35 *Refah (No. 1)* at sec. 76.

36 Ibid. sec. 65.

37 Ibid., sec. 72 (emphasis added); *Refah (No. 2)* at sec. 123.

38 *Refah (No. 1)*, at sec. 63.

> … The Court considers that, whatever meaning is ascribed to the term "jihad" … (*whose primary meaning is holy war and the struggle to be waged until the total domination of Islam in society is achieved*), there was ambiguity in the terminology used [in the speeches of Refah leaders] to refer to the method to be employed to gain political power. In all of these speeches the possibility was mentioned of resorting "legitimately" to force in order to overcome various obstacles Refah expected to meet in the political route by which it intended to gain and retain power.[39]

Those intimidatory pressures for conformity which are a main ground for the headscarf ban in Turkey and the jilbab ban in Denbigh High School are often – and thus in any actual or anticipated instance may reasonably if not correctly be treated bv public authorities as – early precursors of jihad.

IV

Confronted by the grave warnings thus issuing from courts of great pan-European authority, citizens of countries whose Muslim population is increasing very rapidly by immigration and a relatively high birthrate may ask themselves whether it is prudent, or just to the children and grandchildren of everyone in their country, to permit any further migratory increase in that population, or even to accept the presence of immigrant non-citizen Muslims without deliberating seriously about a possible reversal -- humane and financially compensated for and incentivised -- of the inflow. Such thoughts, and the corresponding proposals that might be put forward for reflective deliberation, could not rightly be described as extreme, unless the judgments of both chambers of the Strasbourg Court in *Refah* are extreme. And such proposals themselves would, *mutatis mutandis*, be in line with the Turkish solution upheld so strongly in *Refah*: excluding from public political life the country's largest party and many of its leaders.

Yet when a small and peaceful demonstration was attempted in Brussels, on 11 September 2007, to urge "Against the Islamization of Europe", the Secretary-General of the Council of Europe – the body responsible, together with the Strasbourg

[39] *Refah (No. 2)*, at sec. 130.

Court, for implementing the European Convention on Human Rights – issued a statement[40] condemning the demonstrators as bigots who endanger Europe:

> The fact is that Europe and its values are indeed under threat, but the danger is not coming from Islam. Our common European values are undermined by bigots and radicals, both islamists[41] and islamophobes, who exploit fears and prejudice for their own political objectives.

The rights of freedom of speech and assembly, guaranteed by the Convention, "should not be regarded as a licence to offend", he said, ignoring the many cases in which the Court has held, as it reiterated in *Refah*, that

> freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but *also to those that offend*, shock or disturb (see, among many other authorities, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, § 49, and the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 26, § 37).[42]

More disturbing than the demonstrators' urging that the Islamization of Europe be lawfully and peacefully halted is the Secretary-General's concluding declaration that such urging is vicious and immoral:

> It is very important to remember that the freedom of assembly and expression can be restricted to protect the rights and freedoms of others, including the freedom of thought, conscience and religion. This applies to everyone in Europe including the millions of Europeans of Islamic faith, who were the main target of today's shameful display of bigotry and intolerance.

These claims about targeting and bigotry cannot be sustained coherently without finding *Refah* a "shameful display of bigotry and intolerance" and (mis)reading it as a ruling it that Turkish law could rightly "target" the millions of Turks of Islamic faith who supported the party and government dissolved for seeking to implement that

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40 Council of Europe, Press Release 590 (2007) dated 11 September 2007, and headed "*Europe is threatened by bigots - not by Islam.* Statement by Terry Davis, Secretary General of the Council of Europe, on the march 'Against the Islamisation of Europe' today in Brussels."

41 In no way, however, did the courts in *Refah* give comfort to the idea that "islamism" is a product of "fears and prejudices" rather than of religious dogmas: see *Refah (No. 2)* quoted at n. 37 above.

42 Ibid. sec. 89 (emphasis added).

faith's "stable and invariable" and eminently political "dogmas".[43] The odious violence with which the Belgian police enforced the Mayor of Brussels' ban on the demonstration is matched by the extremism of the Secretary-General's statement.

To read *Refah* reflectively, aware of Europe's demographic trends and immigration policies, is to wonder whether the future of democracy and the rule of law, and of much else besides, is not imperilled here and now by the relentless defaming of all who try to initiate public deliberation about political and legislative action to counter, effectively, the bad and ever-increasingly unavoidable effects of those trends and policies. Such defamation is a kind of extreme speech as potent for ill as many other kinds, and certainly more dominant (and seemingly more reckless about its own long-term effects) than most.

[43] See the judgments of the Third Section and Grand Chamber quoted at n. 37 above.